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A Green Assessment of the European Commission's Proposal on A new mandate for Frontex

The proposal of the European Commission on a "European Border and Coast Guard" significantly increases the competence of Frontex – without increasing fundamental rights safeguards or parliamentary control. So far, the EU border agency was tasked with coordinating Member States' control and surveillance of their external borders. Now, Frontex is renamed into a "European Border and Coast Guard Agency" which is supposed to share responsibility with Member States for the control and surveillance of the EU external borders (this includes ports and airports). The Executive Director of Frontex will make binding decisions for Member states that have to be implemented. In case of non-compliance by the Member State, the Commission can decide to send a Frontex mission against the will of the government. Control mechanisms and fundamental rights provisions proposed by the Commission in no way reflect this new tasks and competences. The proposal is aimed at decreasing "irregular entries", even by refugees.

The most important elements of the proposal

- The most controversial element of the Commission proposal concerns Frontex operations without the agreement of the Member State on whose territory the operation takes place. In case a Member State does not take the "necessary corrective measures" for controlling its external borders or in the event of a "disproportionate migratory pressure" the European Commission can decide to launch a Frontex operation without the request of the Member State concerned. This procedure includes the following steps:
 1. Regular "vulnerability assessment" by Frontex in which the capacity and readiness of Member States to protect their external borders is assessed.
 2. The Frontex Executive Director decides on "corrective measures", if necessary, for increasing border controls by the Member State. This decision is binding for any given Member States.
 3. In case a Member State does not take the required measures, the European Commission consults with the committee of Member States' representatives established in the context of the Schengen Borders Code.
 4. If the committee gives a positive recommendation, the Commission can decide on basis of an implementing act on a Frontex operation and oblige the Member State to cooperate with Frontex.
 5. Possible measures forced on a Member State include: a Frontex operation, a rapid border intervention (accelerated Frontex operation), the registration and screening of asylum seekers and migrants in "hotspots", a joint operation with a neighbouring third country, a return operation, and the deployment of technical equipment such as fingerprint readers.
 6. The Member State concerned "should comply" with the implementing act and agree on the operational plan with the Frontex Director. It is not clear which procedures can be used if they fail to achieve an agreement.
- Saving lives is still excluded from the new Frontex mandate: The Commission proposal only stipulates that Frontex should take "into account that some situations may involve humanitarian emergencies and rescue at sea" when organising an operation. But it does not oblige Frontex to set-up an operation for the purpose of saving lives.

- Instead, the mandate of the new Frontex is extended to internal security: So far, Frontex is responsible for preventing irregular migration and fighting cross-border crime such as smuggling and trafficking; whereas internal security is the exclusive competence of the EU agency for police cooperation, Europol. With the new proposal, fighting "foreign fighters" will also become a task of Frontex. To this end, Frontex is supposed to carry out so-called "multipurpose operations" which might involve security checks.
- The new Frontex can fully operate in third countries neighbouring the EU. So far, cooperation with third countries is limited to administrative cooperation.
- The role of Frontex in return operations is significantly expanded: The new Frontex will be able to propose operations to return persons, which have no right to stay in the EU, on its own initiative. Until now, Frontex can launch a return operation only on the request of a Member State. The new Frontex will operate a Return Office as well as standing pools of forced return escorts, return specialists and forced return monitors. In addition, the Commission proposal specifies that return flights initiated by Frontex are escorted by third country officers. Frontex will also be able to organise return flights from countries outside the EU such as for example the Western Balkans and Turkey ("mixed return operations"). Every return operation must be monitored.
- The Commission proposes a standing corps of a minimum of 1,500 border guards from Member States at the disposal of Frontex, which can be deployed within 3 working days. In addition, a technical equipment pool will be established.
- Frontex is obliged to establish a complaints mechanism. Persons whose fundamental rights have been violated will thus have the possibility to file a complaint with Frontex. This will either be followed up by Frontex itself, or, in case the complaint concerns a guest officer sent by a Member State, by the respective Member State. The European Ombudsman as well as the European Parliament ('Keller/Metsola report') had requested the introduction of such a complaints mechanism.
- In case of serious or persistent fundamental rights violations, the Frontex Executive Director still shall suspend or terminate the operation. As an alternative, he or she can in the future withdraw the financing of the operation. Criteria for establishing a case of serious fundamental rights violations are lacking.

Green position

The aim of the proposal is to have less "irregular entries" at the borders. Based on the assumption that a Member State's external borders are also common EU borders, it forces Member States (even those which still have internal EU border controls, such as Romania and Bulgaria) to accept a Frontex operation on its territory to counter irregular entries. This is a strong message to all member states which don't close their borders: they will be forced to do so. On the other hand, receiving refugees remains an almost voluntary exercise. The fundamental rights provisions proposed by the Commission in no way reflect the new tasks and competences of Frontex. The new Commission proposal will lead to a further blurring of responsibilities between Frontex and the Member States and to increased fundamental rights violations.

- Member States who don't do enough to close their borders to "irregular entries" will have a Frontex operation forced upon them, including cooperation with third countries. At the same time, Member States who are erecting fences, refusing to take part in resettlement or don't fulfil their obligations on relocation or reception face no or not comparable consequences. Member States who want to receive assistance from Frontex may be rejected but Member States may not reject Frontex's operations.
- The role and power of the Frontex Executive Director will be greatly enhanced. S/he will give binding orders to Member States and propose to the Commission to

send mandatory Frontex mission. The Frontex Executive Director is not elected and not accountable to any parliament but will be able to tell governments what to do.

- Although Frontex will in the future be able to operate in third countries, any clear legal provisions and safeguards against fundamental rights violations in this respect are lacking. The Commission proposal only requires that Frontex and the Member States “shall comply with norms and standards at least equivalent to those set by Union legislation”. There are, however, no provisions on how to file a complaint against a third country officer in case of fundamental rights violations, nor are there any provisions on legal liabilities.
- The same holds true for return operations. Frontex return flights can be escorted by third country officers – but those officers are neither bound by EU law nor are they subject to disciplinary measures by Frontex. If they violate EU law and mistreat a person, there is no way of holding them responsible. Generally, fundamental rights provisions concerning return flights are weak in the Commission proposal. The proposal includes neither provisions on an independent monitoring of return flights by NGOs nor any specific provisions on how to ensure the respect of fundamental rights in this particularly sensitive area. Return operation can be ordered by the Commission against the will of the Member State.
- Generally, fundamental rights provisions lag significantly behind the beefing up of Frontex from an agency which coordinates actions among Member States to an agency which shares responsibility and can launch an operation on its own initiative. It is still the sole responsibility of Member States to take disciplinary measures against Frontex guest officers. This amounts to a serious limitation of ensuring compliance with fundamental rights since all Frontex officers on the ground are guest officers sent by Member States (Frontex staff is only involved in administrative tasks). With the new complaint mechanism Frontex only forwards complaints against guest officers to the Member State responsible, but it does not take any responsibility itself.
- Frontex' obligation to suspend or terminate an operation in case of serious fundamental rights violations still exists only on paper. The same holds true for the new possibility to withdraw the financing of an operation. The Greens/EFA group in the European Parliament, together with many NGOs, including the Frontex Consultative Forum, have repeatedly demanded the introduction of clear criteria for serious fundamental rights violations and a proper procedure for the suspension or termination of an operation. Yet, the Commission proposal lacks both.
- The blurring of responsibilities between Frontex and EU Member States has always been a problem. With the new proposal it is further exacerbated. The Commission can decide on a Frontex operation without the agreement of the Member State that is supposed to host the operation. However, the Member State is still liable in case the operation causes damage. Likewise, the Member State has to agree on the operational plan and is in command of the operation which it opposes. Clearly, this is absurd. If the Commission proposal is put into practice as it stands, it will lead to a further increase of the lack of accountability and transparency related to Frontex operations.
- Overall, the absence of appropriate fundamental rights safeguards and clear responsibilities goes hand in hand with a new Frontex mandate which neglects humanitarian responsibilities such as saving lives and instead tasks Frontex with fighting terrorism. It is not fully clear from the Commission proposal what this will actually mean in practice. But it feeds into a long-standing trend in Europe to consider migrants and refugees as a security issue rather than a human rights issue. We Greens/EFA have always opposed this and will continue to do so.
- Next to Fundamental Rights provision, there is also a clear lack or underrepresentation on issues such as facilitation of border crossings and fighting (weapon) smuggling at the border.

Next steps

The new Frontex regulation will only come into force if both the Member States in the Council and the European Parliament agree on it, based to the so-called ordinary legislative procedure. In this process, the Commission proposal can be changed significantly.

- The Member States already announced that they will conclude their common position ("general approach") on the Commission proposal until June 2016.
- The European Parliament has not yet appointed a rapporteur/draftsperson for the Frontex regulation. It is therefore not yet clear when the Parliament will formulate its position ("report").
- In a third step, the Council representing the Member States and the European Parliament will negotiate on a common position. The new Frontex regulation will come into force only if they find an agreement.

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